Supreme Court, U.S.
FILED

06113 0FEB 0 9 2007

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

James J. Armstrong and Nancy L. Armstrong,
Petitioners,

v.

Colonial Bank, N.A.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in affirming the dismissal of an action for usury by sanctioning a holding or dispositive rule of law that precludes an inquiry into or determination of any issues of material fact?

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The District Court's order of dismissal (Doc 26) is reprinted in Appendix A of the Petition Appendix ("Pet. App.") at pages 1a and 2a. The judgment of the Eleventh Circuit's three judge panel of Circuit Judges Tjoflat, Dubina, and Hull is reprinted in Appendix B of the Pet. App. at pages 3a, 4a, and 5a. The Eleventh Circuit's denial of the petitioner's Petition for Rehearing En Banc is reprinted in Appendix C of the Pet. App. at page 6a.

BASIS FOR JURISDICTION

A **Subject Matter Jurisdiction in the District Court.**
The district court had original jurisdiction pursuant to the National Bank Act, 12 U.S.C. § 85, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(a).

B **Jurisdiction in the Court of Appeals.**
The Court of Appeals for the Eleventh Circuit had jurisdiction to hear this case pursuant to 28 U.S.C.§1291 and mandated its Judgment on November 22, 2006.

C. **Jurisdiction in United States Supreme Court**
This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions involved in this case are set forth in Appendix D, of the Petition Appendix.

STATEMENT OF THE CASE

This case challenges the ability of a National Bank to assess and collect usurious interest under the guise and in the form of "overdraft fees".

The Armstrongs filed their original complaint on December 8, 2005, in the Circuit Court of Brevard County, Florida. (Doc 2) On January 10, 2006, Colonial Bank filed its notice of removal (Doc 1), the Armstrongs' original complaint (Doc 2), and Colonial's motion to dismiss for failure to state a cause of action (Doc 3) in the United States District Court for the Middle District of Florida, Orlando Division. On January 27, 2006, the Armstrongs filed their amended complaint. (Doc 10) On February 9, 2006, Colonial filed its motion to dismiss the Armstrongs' amended complaint for failure to state a cause of action, and on February 10 and 13, 2006, Colonial filed its corrected motion to dismiss and memorandum of law. (Doc 21) On February 21, 2006, the Armstrongs filed their response to Colonial's corrected motion to dismiss the amended complaint for failure to state a cause of action. (Doc 22)

On April 3, 2006, the District Court granted Colonial Bank's motion to dismiss the Armstrongs' amended complaint solely upon its finding that: "Overdraft charges are not interest and, accordingly, cannot be usurious. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F.Supp. 2d 1041, (S.D. Fla. 1998), aff'd 205 F.3d 1358 (11th Cir. 2000)." (Doc 26; Appendix A)

On April 12, 2006, the Armstrongs' notice of appeal from the District Court's final order of dismissal (Doc 27) was timely filed with the United States Court of Appeals for the Eleventh Circuit. On September 26, 2006, a three judge panel comprised of Circuit Judges Tjoflat, Dubina, and Hull affirmed the judgment of the District Court (Appendix B) for the reasons stated in the district court's order of dismissal. (Doc 26; Appendix A)

On October 12, 2006, the Armstrongs timely filed their petition for rehearing en banc with the Eleventh Circuit. This petition for rehearing was denied on November 14, 2006, without any Judge having requested the Court to be polled on the rehearing en banc. (Appendix C) The Judgment of the Eleventh Circuit was mandated on November 22, 2006. (Appendix B)

REASONS FOR GRANTING THE PETITION

I. A HOLDING OR DISPOSITIVE RULE OF LAW THAT "ANY CHARGES LABELED AS OVERDRAFT FEES ARE NOT INTEREST AND, ACCORDINGLY, CANNOT BE USURIOUS", IGNORES AND EFFECTIVELY OVERRULES RELEVANT DECISIONS OF THIS COURT WITH RESPECT TO (i) THE IMPORTANCE OF A TRANSACTION'S SUBSTANCE, RATHER THAN FORM, (ii) THE NEED FOR UNCONTROVERTED ALLEGATIONS OF A COMPLAINT TO BE CONSTRUED MOST FAVORABLY TO THE PLEADER, AND (iii) THE CONSTITUTIONAL RIGHT TO HAVE DISPUTED ISSUES OF MATERIAL FACT DETERMINED BY A JURY.

The subject matter of this case is not unique to the Armstrongs, but rather is reflective of a topical issue in which both the general public and the financial services community have a stake. According to USA TODAY'S Kathy Chu, "[Overdraft] fees make up 90% of service charges on deposit accounts, and they're expected to yield a record $53.1 billion for financial institutions this year..."FLORIDA TODAY, BUSINES, November 21, 2006, at page 1C-2C. (Appendix F at page 50a)

In the case now before this Court, the Eleventh Circuit has sanctioned a form of deception by which federal depositories are able to solicit nominal deposits in order to advance and collect funds at yields that greatly exceed the statutory usury rates of the State of Florida, *See* Florida Statutes § 687.03(1) Appendix F at page 33a and § 687.071Appendix F at page 33a. Further, the EleventhCircuit's observance of form over substance threatens the meaningful application of every State's usury laws to resident national banks, redefines the prohibited collection of unlawful debts under the Racketeer Influenced

and Corrupt Organizations Acts. and undermines Truth-in-Lending's uniform disclosure of credit costs under the Consumer Credit Protection Act.

Notwithstanding relevant decisions of this Court which dictated a much different course in the judicial proceedings of this case, the District Court (Doc 26; Appendix A) and the Court of Appeals for the Eleventh Circuit (Appendix B) have held that the dismissal of the petitioners' complaint is required by *Video Trax, Inc. v. NationsBank, N.A.*, 33 F.Supp.2d 1041 (*s.d.* Fla. 1998), *aff'd* 205 F.3d 8 (11th Cir. 2000),*cert. denied* 531 U.S. 822 (2000). In each instance the court looks to *Video Trax, Inc. v. NationsBank, N.A., Id.*, as establishing a dispositive rule of law that precludes an overdraft fee, and implicitly any portion of an overdraft fee, from constituting interest or resulting in usury.

In erroneously concluding that *Video Trax, Inc. v. NationsBank, N.A., Id.*, is dispositive legal precedent, the District Court and the Eleventh Circuit failed to discern or observe the difference between the general application of a "rule of law", and a specific decision made as a "matter of law" in the absence of any disputed material facts. *See Black's Law Dictionary*, pages 1130 and 1497, (revised Fourth Edition, 1968). The summary judgment granted in *Video Trax, Inc v. NationsBank , N.A., Id.* was granted only after the parties to that case conceded "....that no disputed issues of fact exist to preclude judgment as a matter of law....", *Id.* at 1044. As evidenced by the analysis of Judge Gold's opinion set forth in subpart I. A, below, the conclusion of the trial court in *Video Trax* was expressly limited to the "...OD [overdraft] fees at issue...." and "...the [NationsBank] deposit agreement...", *Id.* at 1059, in the case before it on cross motions for summary

judgment. *Id.* at 1044.

In its motion for dismissal in this case (Doc 19 - Pg 1), Colonial Bank has argued that the Eleventh Circuit, as a result of its appellate review of the summary judgment in *Video Trax, Inc. v. NationsBank, N.A., Id.*, already expressly rejected the claims asserted in the Armstrongs' amended complaint. (Doc 21 - Pg 1) Such an argument is frivolous. In actual fact, the allegations and issues of fact in this case were never presented or adjudicated in *Video Trax, Inc. v. NationsBank, N.A., Id.*, and the parties in this case never participated or had the opportunity to participate in *Video Trax, Inc. v. NationsBank, N.A., Id.*. Unlike *Video Trax, Inc. v. NationsBank., N.A., Id.*, the dismissal of the petitioners' amended complaint in this case cannot be attributed to a stipulation of material facts by the parties or any finding of fact by the trial judge.

By sanctioning a dispositive rule of law under which charges denominated or labeled as overdraft fees "...are not interest and, accordingly, cannot be usurious" (Doc 26 pg. 1; Appendix A) the Eleventh Circuit has ignored and effectively overruled relevant decisions of this court with respect to (i) the importance of a transaction's substance, rather than form, (ii) the need for uncontroverted allegations of a complaint to be construed most favorably to the pleader, and (iii) the constitutional right to have disputed issues of material fact determined by a jury.

With the filing of this petition of writ of certiorari, the petitioners must look to the exercise of this Court's supervisory powers to determine whether this case is at its beginning or its end. Moreover, this Court's response to the rogue judgment entered in this case by Circuit Judges Tjoflat, Dubina, and Hull will importantly determine the future of federal judiciary and the ability of loan sharks to exploit the citizenry of our United States.

A. *Video Trax, Inc. v. NationsBank, Inc., Id.*, is not dispositive legal precedent for the contention that overdraft fees cannot be interest.

The trial judge in *Video Trax, Inc. v. NationsBank, N.A., Id.*, only opined as to whether the overdraft fees assessed and collected by NationsBank were interest. As clearly set forth in the second paragraph of Judge Gold's opinion, "...the contested charges [the overdraft fees of Nations Bank] do not constitute interest, and thus, the transaction was not usurious." *Video Trax, Inc. v. NationsBank, N.A., Id.* at page 1044 (emphasis added). The undisputed facts were that NationsBank charged the same flat $25 fee (later $27) for both overdrafts honored by the bank and checks returned for insufficient funds. As to any funds which it chose to advance with respect to overdrafts, NationsBank additionally "...charged interest on the overdraft sums... subject to the maximum rate permissible by law." *Video Trax, Inc. v. NationsBank, N.A., Id.*, at page 1045 (emphasis added).

It is within this context that Judge Gold concluded the flat $25 ($27) fee was not charged in connection with an extension of credit and did not constitute interest. *Video Trax, Inc. v. NationsBank, N.A., Id.*, at pages 1050 and 1059.

Colonial Bank, the defendant in this case, charges a separate $30 "Non-sufficient Available Funds Fee" for checks returned to the presenter uncollected. Colonial Bank's "Overdraft Fee" is only charged with respect to sums voluntarily advanced by Colonial Bank to cover insufficient

account balances. Unlike the undisputed facts in *Video Trax, Inc. v. NationsBank, N.A., Id.*, the overdraft fee in this case is $30 per item, plus $3.00 per day for each day the account balance remains overdrawn. (Doc 10 Pg 6, 7) Unlike NationsBank, Colonial Bank neither identifies nor purports to charge any "interest" on the funds it unilaterally decides to advance to create overdrafts. It is unreasonable to believe Colonial Bank, a for-profit public corporation, advances funds without charging compensation for the use of its money ("interest"). Accordingly, the Armstrongs have alleged and at trial would show, amongst other things, that Colonial Bank's Overdraft Fees are a "... device or artifice employed by defendant [Colonial Bank, N.A.] to obtain unlawful compensation for funds voluntarily advanced..." and such fees "...in whole or in part, ...constitute usurious interest". (Doc 10 Pg 11)

The petitioners in this case believe *Video Trax, Inc. v. NationsBank, N.A., Id.*, was correctly decided on its merits at the trial level and properly affirmed by the Eleventh Circuit. While the petitioners do not agree with various aspects of Judge Gold's rather extensive *dicta,* the accuracy or inaccuracy of such *dicta* was not relevant to the holding in that case and is not relevant to the matter now before this Court.

The central and still undetermined factual issue in this case is the extent to which Colonial Bank's "Overdraft Fee" constitutes interest, as defined under Florida's usury laws to include any

> "... reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest." Florida Statutes § 687.03(1) (emphasis added)

B. Legal precedents of this Court require usury to be determined by the substance, rather than the form of a transaction.

The State of Florida has enacted laws that expressly undertake to prevent evasion of the State's usury laws "...by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever...". Florida Statutes § 687.03(1) In the federal courts this rather traditional social value is achieved by the relevant legal precedents that require usury to be determined upon the substance, rather than the form of a transaction. *American Acceptance Corporation v. Schoenthaler*, 391 F.2d 64 (5th Cir. 1968); *Andrews v. Pond*, et al, 38 U.S. 65 (1839); *Atwood et ux. v. Deming Inv. Co. et al*, 55 F.2d 180 (5th Cir. 1932); *Beausejour Corporation, N.V. v. Offshore*

Development Company, Inc., 802 F.2d 1319 (11th Cir. 1986); *Cockle et al v. Flack et al*, 93 U.S. 344 (1876); *Colgrove v.Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973); *Curtis v. Loether et al*, 415 U.S. 189 94 S.Ct. 1005 (1974); *Missouri, K. & T. Trust Co. v. Krumseig et al*, 172 U.S. 351, 19 S.Ct. 179 (1899); *Moore v. Comfed Savings Bank*, 908 F.2d 834 (11th Cir. 1990); *Sachs et al. v. Ginsberg*, 87 F.2d 28 (5th Cir. 1936); *Scott v. Lloyd*, 34 U.S. 418 (1835).

Chief Justice Marshall's insight on usury remains as true today as it was in 1835.

> "The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. *** Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it." *Scott v. Lloyd, Id*, at page 419.

Florida has defined the act of unlawfully extending credit at interest rates exceeding 25% to be "loan sharking" subject to criminal penalties. *Florida Statutes* § 687.071(1)(g)(2) and (3). Using this standard as a public policy benchmark, both the State of Florida and the federal courts should be concerned when Colonial Bank charges an overdraft fee that can result in annualized yields exceeding seventy thousand percent (70,000%). For example, when $17 is advanced to cover the

shortfall in an account, the one day overdraft fee of $33 results in an annualized yield of approximately 70,852%.

It is a social and economic imperative that this Court use its supervisory power to promptly restore the federal courts' traditional criteria of "substance, rather than form" as the basis for making a factual dermination of interest or usury.

C. Legal precedents of this Court require the uncontroverted allegations of the complaint to be construed in the manner most favorable to the pleader's legal claims.

The District Court's dismissal of the Armstrongs' amended complaint for failure to state a cause of action was fundamental error. Accordingly, the Eleventh Circuit's affirmation of the District Court's order of dismissal sanctions such a radical departure from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's supervisory power. The following standard of review, as stated in relevant decisions of this Court and previous decisions of both the Fifth and Eleventh Circuits, has become an integral part of the judicial process :

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ***

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted); *Scheuer v. Rhodes*, 416 U.S. 232 (1974)." *See also, Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998).

The elements of usury, as set forth in *Video Trax, Id.* at 1056, have been adequately pled and at trial would be sufficiently evidenced for the finder of fact. (Doc 10 Pg 6, 7, 8, 9, 10) The allegations of the amended complaint, including without limitation the substantive nature of the Overdraft Fee, required that Colonial Bank's motion to dismiss be denied.

In granting Colonial Bank's motion to dismiss, both the District Court and the three judge panel of the Eleventh Circuit ignored (a) the uncontroverted allegations set forth in the Armstrongs' amended complaint (Doc 10), and (b) the legal precedents of this Court that require usury to be determined upon the substance, rather than the form of a transaction. *Cockle et al v. Flack et al*, 93 U.S. 344 (1876); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973); *Curtis v. Loether et al*, 415 U.S. 189, 94 S.Ct. 1005 (1974); *Missouri, K. & T. Trust Co. v. Krumseig et al*, 172 U.S. 351, 19 S.Ct. 179 (1899);and, *Scott v. Lloyd*, 34 U.S. 418 (1835).

D. Legal precedents of this Court recognize the constitutional right to have disputed issues of material fact determined at trial by a jury.

The Armstrongs have demanded a trial by jury (Doc 10 Pg 10), as is their constitutional right under Amendment Seven to the Constitution of the United States of America. *Curtis v. Loether et al*, 415 U.S. 189, 94 S.Ct. 1005 (1974); *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558 (1990); *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307 (1982).

> "In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact' - that is, of all the material issues of fact - 'in the circuit courts shall be by jury,' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury." *Hodges v. Easton, Id.*, at page 412.

The opinion in *Video Trax, Inc. v. NationsBank, N.A., Id.*, does not undertake to diminish or preclude the constitutional right to have disputed material facts determined by a jury. Rather, the opinion was predicated on cross motions for summary judgment and the total absence of any disputed material facts. *Video Trax, Inc., Id. v.NationsBank, N.A., Id.* at page 1044. It was solely upon this basis that Judge Gold could correctly opine that the overdraft fees assessed by NationsBank were not interest. While the affirmation of Judge Gold's opinion by the Eleventh Circuit may add to its value as precedent for an identical or substantially similar case, the rather limited application of *Video Trax, Inc., v. NationsBank, N.A., Id.* remains constant, unchanged, and essentially inapplicable to the case before this Court.

With respect to an action for usury, the issues of fact to be determined by a jury include without limitation the determination of (a) the real nature of a transaction's form, (b) the existence of the requisite corrupt intent, and (c) the finding of usury. *Andrews v. Pond*, et al, 38 U.S. 65(1839;

Cockle et al v. Flack et al, 93 U.S. 344 (1876); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973). See *Video Trax, Inc., Id. v. NationsBank, N.A., Id.* at 1056 for the elements of usury in Florida.

While the nature and extent of the disputed material facts in this case remains undetermined in the absence of any responsive pleading or the completion of discovery, all disputed material facts sufficiently supported by the evidence must ultimately be submitted to a jury for determination.

CONCLUSION

For the foregoing reasons, the plaintiffs' petition for writ of certiorari should be granted, and this court should reverse the order dismissing the case with prejudice and remand the case to the District Court for trial on its merits.

Respectfully submitted,

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